BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LORI PIERCE	)	
Claimant	)	
	)	
VS.	)	
	)	
STATE OF KANSAS	)	
Respondent	)	Docket No. **1,039,953**
	)	
AND	)	
	)	
STATE SELF-INSURANCE FUND	)	
Insurance Carrier	)	

ORDER

Both parties requested review of the January 12, 2011 Award by Administrative Law Judge Rebecca A. Sanders. The Board heard oral argument on April 20, 2011.

APPEARANCES

John J. Bryan of Topeka, Kansas, appeared for the claimant. Bryce D. Benedict of Topeka, Kansas, appeared for respondent and its insurance fund.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

It was undisputed claimant suffered a work-related accidental injury but the parties were unable to agree upon the nature and extent of her disability. Respondent argued claimant suffered no permanent impairment as a result of the accidental injury. Claimant argued she not only suffered a permanent impairment to her right lower extremity but also suffered a permanent impairment to her low back as a natural and probable consequence of the antalgic gait she developed due to her knee injury. Consequently, claimant argued she was entitled to compensation for a work disability as well as compensation for the scheduled disability.

The Administrative Law Judge (ALJ) found claimant sustained a 25 percent permanent partial disability to the right leg. ALJ further found claimant did not sustain her burden of proof that she suffered permanent impairment to her hip or back.

Claimant requests review of the nature and extent of claimant's disability. Specifically, whether her back was permanently impaired as a natural and probable consequence of her right knee injury which would entitle her to compensation for a work disability; whether respondent established claimant had a preexisting impairment to her right knee based on the AMA *Guides*[1]; and, whether claimant is entitled to a 15-week healing period pursuant to K.S.A. 44-510d(b).

Claimant argues she suffered a 5 percent impairment to her low back due to an antalgic gait and therefore she is entitled to an 84.5 percent work disability based upon a 100 percent wage loss and a 69 percent task loss. Claimant further argues she is also entitled to a 50 percent right leg impairment due to the injury because respondent failed to establish, pursuant to the AMA *Guides*, that she had a preexisting impairment. Finally, claimant argues she is entitled to a healing period in the calculation of the scheduled disability.

Respondent argues claimant is not entitled to any additional impairment because she had a preexisting 50 percent impairment before the injury and a 50 percent impairment after the injury. Consequently respondent further argues there has been no increase in functional impairment. In the alternative, respondent argues claimant is limited to compensation for a scheduled disability to the right leg as she failed to meet her burden of proof to establish a permanent back impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award sets out findings of fact and conclusions of law that are detailed, accurate and supported by the record. It is not necessary to repeat those findings and conclusions herein. The Board adopts the ALJ's findings and conclusions as its own as if specifically set forth herein except as hereinafter noted.

Briefly stated, claimant was employed as a mental health technician for respondent. On February 7, 2008, claimant slipped and fell on the ice injuring her right knee. Dr. Joseph Mumford performed a total knee replacement on October 14, 2008. Post-surgery

[1] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the AMA *Guides* unless otherwise noted.

treatment included eight months of physical therapy. She finally returned to light-duty work in April 2009, which she described as not lifting patients and simply taking feeding bags to pumps for patients provided nutrition through a feeding bag. Dr. Mumford determined claimant had reached maximum medical improvement in October 2009. Claimant received a letter dated November 30, 2009, from her superintendent, indicating that respondent was unable to provide accommodations within her restrictions. She was terminated in December 2009.

Claimant testified that her right knee swells, catches, get's hot and won't bend. Claimant is not able to straighten the right leg. She further testified that she favors her right leg when she walks. She testified that she has a dull ache in her lower back. Claimant uses a heating pad and also takes hot baths in order to reduce the pain.

Past history indicated claimant underwent arthroscopy of the right knee with removal of the posterior horn of the medial meniscus and arthroscopic lateral retinacular resection in February 1982. In 1984 claimant again had arthroscopic surgery of the right knee with findings of chondromalacia involving the medial femoral and tibial condyles. Claimant testified that following these procedures she did well and her right knee was asymptomatic until the fall at work in 2008.

At the request of claimant's attorney, Dr. Edward Prostic, a board certified orthopedic surgeon, examined and evaluated claimant on January 5, 2010. The doctor reviewed the medical records provided and also took a history from claimant. Upon physical examination, Dr. Prostic found claimant walked with an antalgic gait due to favoring her right lower extremity. The doctor opined claimant has significant difficulties despite her total knee replacement arthroplasty but he did not recommend any additional treatment for the right knee. Dr. Prostic testified:

> Q. Why is she having problems?
>
> A. Some people just get a fibrotic reaction after surgery. It happens in about one to two percent of total knee replacements and most people have it quiet [sic] done after a year or so. If we're intensive with physical therapy and if we manipulate them early, we can regain most of the motion. But if the patient isn't compliant with physical therapy or if we're too late doing the manipulation under anesthesia, then we have missed the chance.
>
> Q. She's now two years out from her surgery and two-and-a-half years out from her injury. Is anything going to change for her absent some other surgery?
>
> A. No.[2]

[2] Prostic Depo. at 4-5.

Dr. Prostic opined that claimant's limping due to the antalgic gait causes her low back pain because of the altered body mechanics. It takes more energy to walk when you have more flexion contracture. The doctor ordered an x-ray of claimant's lumbar spine which revealed some mild disk space narrowing at L5-S1.

Based on the AMA *Guides*, Dr. Prostic gave claimant a 5 percent impairment for her low back and a 50 percent impairment to her right lower extremity. These impairments combine for a 24 percent whole body functional impairment. Dr. Prostic reviewed the list of claimant's former work tasks prepared by Mr. Bud Langston and concluded claimant could no longer perform 11 of the 16 tasks for a 69 percent task loss.

Dr. Prostic testified that Dr. Gurba's restrictions of no kneeling, squatting, climbing or crawling as well as alternate sitting and standing would allow claimant to perform sedentary or predominantly light activities.

On cross-examination, Dr. Prostic testified:

> Q. When you reviewed the medical records, what was the first documented instance of low back pain?
>
> A. I don't recall.
>
> Q. Do you recall that there were any records documenting any low back pain prior to her seeing you?
>
> A. I don't recall seeing any documentation of low back pain prior to her seeing me.[3]

Dr. John Gilbert, board certified in orthopedic surgery and as an independent medical examiner, examined and evaluated claimant on February 10, 2010, at respondent's attorney's request. The doctor reviewed the medical records provided and also took a history from claimant. After a physical examination, Dr. Gilbert diagnosed claimant as having an acute strain in the right knee, osteoarthritis in the knees, with a fair result in the right knee following right knee replacement arthroplasty. The doctor determined claimant had reached maximum medical improvement. Dr. Gilbert opined that claimant was capable of working within the physical restrictions imposed by Dr. Mumford. He recommended that claimant continue to use analgesics and support for ambulation as necessary to control her symptoms and that she would benefit from weight loss.

Dr. Gilbert, using the AMA *Guides*, gave claimant a 65 point score for her right knee arthroplasty which falls between 50-84 points for a fair result which is a 50 percent impairment to the right lower extremity. The doctor opined that 75 percent of his

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[3] *Ibid.* at 30.

impairment rating was due to claimant's preexisting degenerative joint disease and therefore claimant only had a 12.5 percent impairment due to her work-related injury.

X-rays performed on February 11, 2008, showed advanced degenerative disease throughout the right knee. An MRI performed on April 16, 2008, revealed advanced tricompartmental disease with surgical absence of a large portion of the medial meniscus.

Dr. Gilbert testified that he did not find any low back complaints with regard to the medical records he reviewed. Dr. Gilbert further testified that claimant did have a mild antalgic gait at the time he performed his examination but it was not significant enough to cause a low back impairment. Dr. Gilbert testified that part of claimant's femur had to be removed in order for the artificial knee to be attached. Dr. Gilbert testified:

> Q. Can you give me a description of what is done to -- in preparation to put in the artificial knee. Surgically, I'm speaking of.
>
> A. The incision's made over the front of the knee. Soft tissues are released to expose the distal femur and proximal tibia mobilizing the patella one way or another, usually. The bony surfaces of the distal femur and the proximal tibia are then carpentered to accept the resurfacing replacements.
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> Trials are implanted to make sure that the sizes are right, that the ligaments are tensioned correctly and the mechanics of the knee are correct. And then appropriate permanent implants are placed sometimes with a press fit, just tight carpentry and sometimes with cement.
>
> Q. Is the end of the femur partially removed?
>
> A. Yes, sir.[4]

Dr. Gilbert further responded to questions that both the end of the claimant's femur and tibia had to be actually removed or amputated. Dr. Gilbert explained that the amount of bone removed varied in order to make the permanent replacement fit. Dr. Gilbert testified:

> Q. Okay. And the quantity of bone that's removed from the femur would be about how much? Half inch or what would it be?
>
> A. Well, it varies depending on -- frequently there is -- there has been bone lost in the bone on bone configuration, articular cartilage erodes and then bone erodes. And so where the bone is actually worn they [sic] actually be [sic] less removed. But they're -- with, you know, perhaps more in other areas. You have to tailor the end

[4] Gilbert Depo. at 23-24.

> of the bone, carpenter the end of the bone to fit the prosthesis in satisfactory alignment.[5]

Bud Langston, vocational rehabilitation consultant, conducted a personal interview with claimant in January 2010, at the request of her attorney. He prepared a task list of 16 nonduplicative tasks claimant performed in the 15-year period before her injury. Mr. Langston opined claimant would be able to perform occupations of a sedentary, light and medium exertion strength level.

On May 11, 2010, the ALJ ordered an independent medical examination of claimant by Dr. Terrance Pratt. The order provided in pertinent part:

> B. If Claimant is determined to be at maximum medical improvement, the neutral examiner is requested to offer his opinion on Claimant's permanent impairment of function, as determined by reference to the AMA Guides to the Evaluation of Permanent Impairment, 4th Edition, and appropriate permanent work restrictions.
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> C. If the neutral examiner believes that any of the Claimant's current impairment preexisted the alleged date of accident, the neutral examiner is requested to rate that impairment by using only the AMA Guides.

Dr. Pratt reviewed claimant's medical records and also took a history. Dr. Pratt performed a physical examination and diagnosed claimant with significant degenerative disease status post total right knee replacement; a history of lateral release and medial meniscus repair and subsequent procedure for chondromalacia right knee; history of left hip discomfort with near resolution and history of mild low back pain with reported lumbosacral degenerative disk disease. The doctor opined that claimant's left hip discomfort and low back complaints essentially resolved and he did not identify any findings to support permanent impairment in the hip or back.

Based on the AMA *Guides*, Dr. Pratt rated claimant's right knee involvement at 20 points, range of motion for both flexion and extension at 16 points, stability was good for 25 points which results in a 61 percent less the deduction of 2 points for limited range of motion with a flexor contracture. Comparing the 59 points to table 64, page 3/85 results in a fair result which provides a 50 percent right lower extremity impairment.

Dr. Pratt opined that claimant had a preexisting impairment to her right knee due to the medial meniscus procedure, lateral release and the chondromalacia procedure. Dr. Pratt opined that claimant suffered a 25 percent impairment from the aggravation to the right lower extremity due to her work-related injury on February 7, 2008. The residual 25

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[5] *Ibid.* at 27-28.

percent was due to the preexisting involvement with degenerative changes and prior procedures.

Initially, it must be noted that claimant requests compensation for both a scheduled disability to her right leg and a work disability based upon permanent injury to her back as a natural and probable consequence of an antalgic gait from her knee injury.

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson,*[6] the court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

If claimant establishes that her antalgic gait led to permanent back impairment she would be entitled to compensation for that injury. But a back injury is a nonscheduled whole person impairment.

And in the determination of whether the claimant has sustained a scheduled or a non-scheduled disability it is the situs of the resulting disability, not the situs of the trauma, which determines the workers' compensation benefits available.[7] In *Bryant*[8], the Kansas Supreme Court stated the general rule:

> If a worker sustains only an injury which is listed in the -510d schedule, he or she cannot receive compensation for a permanent partial general disability under -510e. If, however, the injury is both to a scheduled member and to a nonscheduled portion of the body, compensation should be awarded under -510e.

Simply stated, the Kansas Supreme Court has held that if the injury is both to a scheduled member and to a nonscheduled portion of the body, the disabilities should be combined and compensation should be awarded under K.S.A. 44-510e.[9] Consequently, claimant can only recover compensation for either a scheduled disability to her right leg or for a

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[6] *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

[7] *Bryant v. Excel Corporation*, 239 Kan. 688, 722 P.2d 579 (1986); *Fogle v. Sedgwick County*, 235 Kan. 386, 680 P.2d 287 (1984).

[8] *Bryant v. Excel*, 239 Kan. 688, 689, 722 P.2d 579 (1986).

[9] See also *Goodell v. Tyson Fresh Meats*, 43 Kan. App. 2d 717, 235 P.3d 484 (2009); *McCready v. Payless Shoesource*, 41 Kan. App. 2d 79, 200 P.3d 479 (2009).

nonscheduled disability under K.S.A. 44-510e but not separate awards of compensation for both.

Claimant testified that she has pain in her hip and back due to her antalgic gait. Dr. Gilbert noted that claimant's medical records did not contain any mention of back complaints and he opined that her mild limp was insufficient to cause permanent back impairment. Conversely, Dr. Prostic opined claimant suffered permanent impairment due to her antalgic gait. But Dr. Prostic agreed there was no mention of any back complaints in the claimant's medical records and she had neither received nor requested back treatment. And Dr. Prostic did not recommend any medical treatment for claimant's back. The court ordered independent medical examiner, Dr. Pratt, reviewed claimant's medical records and performed a physical examination. Dr. Pratt opined that on his examination of claimant he did not identify any findings that would support permanent impairment to claimant's hip or back. The ALJ determined claimant failed to meet her burden of proof that she suffered permanent impairment to her back. The ALJ analyzed the evidence in the following manner:

> The nature and extent of Claimant's permanent impairment related to the February, 2008 accident is an impairment to the right knee. The only clinical findings of impairment to her lumbar spine were intermittent aches in her low back and left hip and x-rays showing mild disc narrowing at L5-S1. There were no limits on range of motion and there was no palpable tenderness. The only record of lumbar spine problems were at the time she saw Dr. Prostic and he still had minimal findings in regards to the lumbar spine. Dr. Pratt, the Court appointed physician also did not find any impairment in the Claimant's hip or lumbar spine. For these reasons it is found that Claimant had permanent impairment, due to her February, 2008 accident, to her right knee.[10]

Claimant notes that there were mentions of hip pain in the reports from the physical therapists in December 2008 and once in January 2009. Although Dr. Pratt noted those hip complaints had been made he further noted claimant indicated the symptoms were nearly resolved and Dr. Pratt did not identify any findings to support permanent impairment to the claimant's hip or the back. The Board affirms the ALJ's determination that claimant failed to meet her burden of proof to establish she suffered permanent impairment to her back as a result of the February 2008 accidental injury.

Drs. Prostic, Gilbert and Pratt all opined that claimant suffers a 50 percent impairment to her right lower extremity. Dr. Prostic agreed claimant had preexisting impairment in her right knee but he stated that he was not asked to rate any preexisting impairment. Dr. Gilbert concluded claimant had preexisting impairment and attributed only 12.5 percent to the work-related injury. Likewise, Dr. Pratt concluded that as a result of her

[10] ALJ Award at 8.

prior surgeries to the right knee claimant had preexisting impairment of 25 percent and he attributed 25 percent to the work-related injury.

The Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the injured worker aggravates a preexisting condition. The Act reads:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of **functional** impairment determined to be preexisting.[11] (Emphasis Added)

K.S.A. 44-510d(23) provides that loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

The Board has held that any preexisting functional impairment must also be determined utilizing the same criteria. Requiring the application of the same standard in the determination of both the preexisting as well as the current functional impairment percentage results in a final comparison of equal value percentages. A physician may appropriately assign a functional impairment rating for a preexisting condition that had not been rated. However, the physician must use the claimant's contemporaneous medical records regarding the prior condition. Additional factors to consider include the level of claimant's pain immediately before the recent injury, whether claimant received additional treatment and the nature of her activities in the intervening years in order to determine the preexisting impairment.[12] Those factors must then be the basis of the impairment rating using the appropriate edition of the AMA *Guides*.

Dr. Pratt explained his rating for claimant's preexisting impairment in the following fashion:

> I do believe that she has some impairment in relationship to the 2008 event but I also believe that she had impairment preexisting the alleged date of accident. As outlined, she had the medial meniscus procedure, lateral release as well as procedure for chondromalacia preexisting the reported event. Significant degenerative changes were identified and felt to relate the factors preexisting the event. If we just consider table 62, page 3/83 noting her significant limitations at the knee level in terms of degenerative changes, she would have somewhere between

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[11] K.S.A. 2008 Supp. 44-501(c).

[12] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, Syl. ¶ 5, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

> 25% to 50% permanency of the lower extremity. Of the permanency identified for the right lower extremity, I would relate 25% at the lower extremity level directly to the reported vocationally related event with aggravation of underling involvement. The residual (25%) I would relate to the preexisting involvement with degenerative changes and prior procedures.[13]

It is clear Dr. Pratt reviewed claimant's prior medical records and took her previous right knee surgeries into consideration in determining she had a 25 percent preexisting impairment. The ALJ adopted Dr. Pratt's opinion as the most persuasive, the Board agrees and affirms. Claimant has met her burden of proof to establish that she suffered a 25 percent functional impairment to her right lower extremity as a result of her February 7, 2008, work-related accidental injury.

Finally, claimant alleges she should be entitled to a healing period because Dr. Gilbert indicated that the femur and tibia are amputated in order to affix the knee replacement. But the issue of entitlement to a healing period was not orally raised at the regular hearing nor listed as an issue in claimant's brief to the ALJ.

K.S.A. 44-555c(a) states in part:

> There is hereby established the workers compensation board. The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. **The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge**. (Emphasis added)

The statute mandates that the Board's consideration be on issues presented to the ALJ. Issues not raised before the ALJ cannot be raised for the first time on appeal. To hold otherwise would place the Board in the position of attempting to decide an issue based upon an incomplete record and, in this instance would deny respondent the benefit of evidence that may have been presented if it had been aware that there was a dispute as to such issue.[14]

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Rebecca A. Sanders dated January 12, 2011, is affirmed.

IT IS SO ORDERED.

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[13] Pratt's IME (Jul. 15, 2010) at 5.

[14] See *Scammahorn v. Gibraltar Savings & Loan Assn.*, 197 Kan. 410, 416 P.2d 771 (1966).

Dated this _____ day of May, 2011.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
Bryce D. Benedict, Attorney for Respondent and its Insurance Fund
Rebecca A. Sanders, Administrative Law Judge